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## SMALL BUSINESS ADMINISTRATION

13 CFR Part 121

RIN: 3245-AG08

Small Business Size Standards: Transportation and Warehousing.

AGENCY: U.S. Small Business Administration.

ACTION: Final Rule.

SUMMARY: The United States Small Business Administration (SBA) is increasing the small business size standards for 22 industries in North American Industry Classification System (NAICS) Sector 48-49, Transportation and Warehousing, and retaining the current standards for the remaining 37 industries in that Sector. As part of its ongoing comprehensive review of all size standards, SBA has evaluated all receipts based standards for industries in NAICS Sector 48-49 to determine whether they should be retained or revised. SBA did not review the employee based standards for industries in NAICS Sector 48-49, but will do so at a later date with other employee based size standards.

DATES: This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER.]

FOR FURTHER INFORMATION CONTACT: Jon Haitzuka, Program Analyst, Size Standards Division, (202) 205-6618 or [sizestandards@sba.gov](mailto:sizestandards@sba.gov).

### SUPPLEMENTARY INFORMATION:

To determine eligibility for Federal small business assistance programs, SBA establishes small business size definitions (referred to as size standards) for private sector

industries in the United States. SBA's existing size standards use two primary measures of business size – average annual receipts and number of employees. Financial assets, electric output and refining capacity are used as size measures for a few specialized industries. In addition, SBA's Small Business Investment Company (SBIC), 7(a), and Certified Development Company (CDC or 504) Loan Programs determine small business eligibility using either the industry based size standards or net worth and net income size based standards. At the start of the current comprehensive review of SBA's small business size standards, there were 41 different size standards levels, covering 1,141 NAICS industries and 18 sub-industry activities. Of these, 31 were based on average annual receipts, seven based on number of employees, and three based on other measures.

Over the years, SBA has received comments that its size standards have not kept up with changes in the economy, in particular, that they do not reflect changes in the Federal contracting marketplace and industry structure. SBA last conducted a comprehensive review of size standards during the late 1970s and early 1980s. Since then, most reviews of size standards have been limited to a few specific industries in response to requests from the public and Federal agencies. SBA also makes periodic inflation adjustments to its monetary based size standards. The latest inflation adjustment to size standards was published in the Federal Register on July 18, 2008 (73 FR 41237).

SBA recognizes that changes in industry structure and the Federal marketplace since the last overall review have rendered existing size standards for some industries no longer supportable by current data. Accordingly, in 2007, SBA began a comprehensive

review of its size standards to determine whether existing size standards have supportable bases relative to the current data, and to revise them, where necessary.

In addition, on September 27, 2010, the President of the United States signed the Small Business Jobs Act of 2010 (Jobs Act). The Jobs Act directs SBA to conduct a detailed review of all size standards and to make appropriate adjustments to reflect market conditions. Specifically, the Jobs Act requires SBA to conduct a detailed review of at least one-third of all size standards during every 18-month period from the date of its enactment and review of all size standards not less frequently than once every 5 years thereafter. Reviewing existing small business size standards and making appropriate adjustments based on current data is also consistent with Executive Order 13563 on improving regulation and regulatory review.

SBA has chosen not to review all size standards at one time. Rather, it is reviewing groups of related industries on a Sector by Sector basis.

As part of SBA's comprehensive review of size standards, the Agency reviewed all receipts based size standards in NAICS Sector 48-49, Transportation and Warehousing, to determine whether the existing size standards should be retained or revised. On May 13, 2011, SBA published a proposed rule in the Federal Register (76 FR 27935) seeking public comment on its proposal to increase the size standards for 22 industries in NAICS Sector 48-49. The rule was one of a series of proposed rules that examines industries grouped by NAICS Sector.

SBA developed a "Size Standards Methodology" for developing, reviewing, and modifying size standards, when necessary. SBA published the document on its website at [www.sba.gov/size](http://www.sba.gov/size) for public review and comment and also included it as a supporting

document in the electronic docket of the May 13, 2011 proposed rule at [www.regulations.gov](http://www.regulations.gov).

In evaluating an industry's size standard, SBA examines its characteristics (such as average firm size, startup costs, industry competition and distribution of firms by size) and the level and small business share of Federal contract dollars in that industry. SBA also examines the potential impact a size standard revision might have on its financial assistance programs and whether a business concern under a revised size standard would be dominant in its industry. SBA analyzed the characteristics of each industry in NAICS Sector 48-49 that has a receipts based size standard, mostly using a special tabulation obtained from the U. S. Bureau of the Census based on its 2007 Economic Census (the latest available). SBA also evaluated the level and small business share of Federal contracts in each of those industries using the data from the Federal Procurement Data System – Next Generation (FPDS-NG) for fiscal years 2007 to 2009. To evaluate the impact of changes to size standards on its loan programs, SBA analyzed internal data on its guaranteed loan programs for fiscal years 2008 to 2010.

SBA's "Size Standards Methodology" provides a detailed description of its analyses of various industry and program factors and data sources, and how the Agency uses the results to derive size standards. In the proposed rule, SBA detailed how it applied its "Size Standards Methodology" to review and modify, where necessary, the existing standards for industries in NAICS Sector 48-49. SBA sought comments from the public on a number of issues about its "Size Standards Methodology," such as whether there are alternative methodologies that SBA should consider; whether there are alternative or additional factors or data sources that SBA should evaluate; whether SBA's

approach to establishing small business size standards makes sense in the current economic environment; whether SBA's applications of anchor size standards are appropriate in the current economy; whether there are gaps in SBA's methodology because of the lack of comprehensive data; and whether there are other facts or issues that SBA should consider.

SBA sought comments on its proposal to increase receipts based size standards for 22 industries in NAICS Sector 48-49 (Transportation and Warehousing) and retain the existing size standards for remaining industries in that Sector. Specifically, SBA requested comments on whether the size standards should be revised as proposed and whether the proposed revisions are appropriate. SBA also invited comments on whether its proposed eight fixed size standard levels are appropriate and whether it should adopt common size standards for several Subsectors and Industry Groups in NAICS Sector 48-49.

SBA's analyses supported lowering existing receipts based standards for 18 industries. However, as SBA pointed out in the proposed rule, lowering size standards would reduce the number of firms eligible to participate in Federal small business assistance programs and this is contrary to what the Federal government and the Agency are doing to help small businesses. Therefore, SBA proposed to retain the current size standards for those industries and requested comments on whether the Agency should lower size standards for those industries for which its analyses might support lowering them.

In addition, because of lack of relevant industry data, SBA proposed no changes to current size standards for the following: Offshore Marine Air Transportation Services

(sub-industries or “exceptions” to both NAICS Codes 481211 and NAICS 481212); Offshore Marine Water Transportation Services (exception to NAICS Subsector 483); Non-Vessel Owning Common Carriers and Household Goods Forwarders (exception to NAICS Code 488510); and Postal Services (NAICS Code 491110). SBA sought comments on this proposal as well as supporting information if different size standards appeared more appropriate for these industries or sub-industries.

#### Summary of Comments

SBA received six comments to the proposed rule. However, three of them were related to the proposed rule for NAICS Sector 54 (Professional, Technical, and Scientific Services), which was published for comments separately about the same time. One of those three comments was submitted within the comment period for the NAICS Sector 54 proposed rule, and therefore SBA considered it along with the other comments in drafting a final rule for that Sector. However, the other two comments were submitted after the closing date for the comment period for Sector 54 (June 15, 2011), and thus were not considered for NAICS Sector 54 (because they were untimely) or for this rule (because they were not relevant). Therefore, SBA received and considered three valid comments to the proposed rule on NAICS Sector 48-49. Each of these comments is discussed below.

SBA received one comment on NAICS 484230 (Specialized Freight (except Used Goods) Trucking, Long-Distance). For the reasons provided in the proposed rule, SBA proposed to retain the current \$25.5 million size standard for that NAICS code, although its analyses of industry data related to all industries within NAICS Subsector 484 and to NAICS Code 484230 individually supported a lower \$19 million size standard. The

commenter stated that the size standard for NAICS Code 484230 should not be lowered to \$19 million based on SBA's analyses, but instead should be increased to \$30 million from the current \$25.5 million. However, the comment provided no specific data or analysis justifying why the \$30 million size standard is a more appropriate size standard than \$25.5 million for that industry. Rather, the commenter simply pointed out SBA's results on certain industry and Federal procurement factors to justify the \$30 million size standard. Although the four-firm concentration ratio was only 8 percent (i.e., much lower than 40 percent for this to factor in the calculated size standard), the commenter suggested that the size standard be increased to \$30 million based on that factor. Similarly, although the Gini coefficient value reflecting the size distribution of firms in that industry supported the current \$25.5 million size standard, the commenter argued that the size standard should be \$30 million instead. Finally, the commenter contended that the size standard for NAICS Code 484230 should be \$30 million because the Federal contracting factor, based on the 2007-2009 FPDS-NG data, supported that level. As explained in the SBA's size standards methodology as well as in the proposed rule, SBA calculates an industry's size standard based on the average of size standards supported by each of industry and Federal factors, not based on one or several factors that support a higher size standard. Although SBA sought comments on whether it should weigh some factors more heavily than others for specific industries, the commenter provided no feedback on this issue.

In response to the comment, SBA analyzed updated 2008-2010 Federal procurement data and industry data from an updated tabulation of the 2007 Economic Census. The updated data produced a Gini coefficient value that supported a higher

\$30 million size standard, and the Federal contracting factor based on the updated data supported a higher \$35.5 million size standard than the previous analyses. However, SBA's analysis based on all factors continued to support the current \$25.5 million size standard for NAICS Code 484230 because the remaining industry factors supported a standard much lower than the current \$25.5 million size standard. Because all industries within NAICS Subsector 484 currently share a common size standard, SBA also used the updated data to recalculate the appropriate common size standard for NAICS Subsector 484 and found it to be \$19 million. Since SBA received no comments opposing its proposal to retain a common size standard for all industries in NAICS Subsector 484, the Agency is maintaining a common size standard for these industries. However, continuing its policy of not lowering any size standards under the current economic environment, SBA is adopting the current \$25.5 million size standard for all industries in NAICS Subsector 484, including NAICS Code 484230. In other words, SBA has not adopted the commenter's recommendation to increase the size standard for NAICS Code 484230 to \$30 million.

Additionally, the commenter suggested that fuel surcharges should be excluded from the calculation of receipts when determining if a company meets the size standard. SBA's definition of receipts states the following: "Receipts means 'total income' (or in the case of a sole proprietorship, 'gross income') plus 'cost of goods sold' as these terms are defined and reported on Internal Revenue Service (IRS) tax return forms ...."

13 CFR 121.104. The definition of receipts provides for a limited number of specific exclusions, none of which relates to fuel surcharges or other fuel related costs. Fuel surcharges are part of the usual and customary costs of doing business. In addition, fuel



surcharges that businesses collect are subject to taxation and therefore are part of a firm's revenues. Further, SBA uses data from the Economic Census, and the revenue data that firms report under law to the Economic Census include those costs. Accordingly, SBA does not exclude fuel surcharges from the calculation of receipts for small business size determination purposes. SBA acknowledges that firms in the transportation industries may have substantial fuel surcharges or other fuel related costs, and, as such, the Agency may consider such costs as a secondary factor in addition to the primary industry and Federal procurement factors that SBA evaluates when establishing small business size standards.

Another commenter felt that most of the revenues generated from the commenter's firm's contracts are passed through to its many subcontractors, which were tied to its costs and thus should not be included as part of its revenues. The commenter pointed out that on average the subcontractors are paid 82 percent of the total contract value, and including these pass-throughs overstates the firm's revenues. The commenter stated that the requirement to include subcontracting costs in revenues had an adverse impact on its business' size determination because it caused its total revenues to exceed the size standard. The commenter suggested that costs of goods sold be removed from the definition of receipts and that actual profit be the determining factor on whether a firm qualifies as small.

This is not a new suggestion, nor is it unique to transportation industries. As explained above, SBA's definition of receipts states that "receipts means 'total income' ... plus 'cost of goods sold' ..." and provides for a limited number of specific exclusions. 13 CFR §121.104. None of the enumerated exclusions relates to subcontracting costs.

Similar to fuel surcharges mentioned above, SBA does not allow for the exclusion of subcontracting costs (commonly known as “pass-throughs”) from the calculation of revenues because they are part of the usual and customary costs of doing business. Additionally, SBA uses data from the U.S. Bureau of the Census’ 2007 Economic Census, and the revenue data that firms report under law) to the Economic Census include subcontracting and other costs of goods sold. If the Agency were to exclude the value of “pass-through” revenues, SBA would also have to establish a lower size standard to reflect the size of the industry without them.

SBA has always included all revenues, including pass-throughs or subcontracting costs, for size standards purposes for several reasons. First, as stated above, the revenue data SBA receives from the Economic Census includes those costs. Second, this practice is consistent with the Small Business Act, which refers to SBA’s establishing size standards based on “...annual average gross receipts of the business concern...” § 3(a)(2)(C)(ii)(II) [emphasis added]. Third, SBA’s existing definitions of receipts and employees provide a consistent approach to establishing eligibility for small business programs for all industries. Fourth, if SBA were to exclude certain costs for one or a few industries, other industries could raise the same questions, creating a “slippery slope” leading toward widespread inconsistency in how businesses calculate their receipts to determine if they qualify as small.

The third commenter supported the increase in the size standard for NAICS Code 485113 (Bus and Motor Vehicles Transit Systems) from \$7.0 million in average annual receipts to \$14.0 million in average annual receipts because the higher size standard better reflected current operations of the commenter’s business, where a large portion of

small business set-aside contracts had to be subcontracted to other businesses. The commenter stated that subcontractors are paid on average 85 percent of the total contract value, while the commenter's business receives the remaining 15 percent.

SBA acknowledges that some industries may have substantially higher subcontracting costs than others. SBA considers subcontracting costs as a secondary factor, in addition to the primary industry and Federal procurement factors, when it reviews size standards for those industries. In other words, SBA may make further adjustments to small business size standards, if necessary, for industries for which subcontracting costs are substantially higher than for other industries.

SBA notes that two of the three comments indicated that subcontracting costs accounted for more than 80 percent of the total value of work in their industries. It is important to point out that SBA's regulations on Government Contracting Programs provide that "[i]n order to be awarded a full or partial small business set-aside contract, an 8(a) contract, a WOSB or EDWOSB contract pursuant to part 127 of this chapter, . . . a small business concern must agree that: (1) In the case of a contract for services (except construction), the concern will perform at least 50 percent of the cost of the contract incurred for personnel with its own employees...." 13 CFR § 125.6. A firm undertaking such contracts must comply with these "limitations on subcontracting," even if it otherwise appears to meet the small business size standard for a particular procurement. It cannot qualify as small for award under any of the aforementioned programs if it subcontracts more than 50 percent of the contract.

SBA received no comments opposing its proposal to retain the current size standards where analyses suggested lowering them. The Agency also received no

comments opposing SBA’s proposal to retain the current standards where relevant data were not available.

All comments to the proposed rule are available for public review at <http://www.regulations.gov>.

### Conclusion

Based on SBA’s analyses of relevant industry and program data and the public comments it received on the proposed rule, SBA has decided to increase the small business size standards for the 22 industries in NAICS Sector 48-49 to the levels it proposed. Those industries and their revised size standards are shown in the following Table 1, Summary of Revised Size Standards in NAICS Sector 48-49.

Table 1  
Summary of Revised Size Standards in NAICS Sector 48-49

NAICS codes	NAICS industry title	Current size standard (\$ millions)	New size standard (\$ millions)
481219	Other Nonscheduled Air Transportation	\$7.0	\$14.0
485111	Mixed Mode Transit Systems	\$7.0	\$14.0
485112	Commuter Rail Systems	\$7.0	\$14.0
485113	Bus and Other Motor Vehicle Transit Systems	\$7.0	\$14.0
485119	Other Urban Transit Systems	\$7.0	\$14.0
485210	Interurban and Rural Bus Transportation	\$7.0	\$14.0
485310	Taxi Service	\$7.0	\$14.0
485320	Limousine Service	\$7.0	\$14.0
485410	School and Employee Bus Transportation	\$7.0	\$14.0
485510	Charter Bus Industry	\$7.0	\$14.0
485991	Special Needs Transportation	\$7.0	\$14.0

485999	All Other Transit and Ground Passenger Transportation	\$7.0	\$14.0
486210	Pipeline Transportation of Natural Gas	\$7.0	\$25.5
488111	Air Traffic Control	\$7.0	\$30.0
488119	Other Airport Operations	\$7.0	\$30.0
488190	Other Support Activities for Air Transportation	\$7.0	\$30.0
488210	Support Activities for Rail Transportation	\$7.0	\$14.0
488310	Port and Harbor Operations	\$25.5	\$35.5
488320	Marine Cargo Handling	\$25.5	\$35.5
488330	Navigational Services to Shipping	\$7.0	\$35.5
488390	Other Support Activities for Water Transportation	\$7.0	\$35.5
488510	Freight Transportation Arrangement <sup>10</sup>	<sup>10</sup> \$7.0	\$14.0

For the reasons stated above in this rule and in the proposed rule, SBA has decided to retain the current receipts based size standards for 18 industries for which analytical results suggested lower size standards. Not lowering size standards in NAICS Sector 48-49 is consistent with SBA's recent final rules on NAICS Sector 44-45, Retail Trade (75 FR 61597, October 6, 2010); NAICS Sector 72, Accommodation and Food Services (75 FR 61604, October 6, 2010); and NAICS Sector 81, Other Services (75 FR 61591, October 6, 2010). In each of those final rules, SBA adopted its proposal not to reduce small business size standards for the same reasons. SBA is also retaining the existing receipts based size standards for two industries for which the results supported them at their current levels. Accordingly, SBA has retained the existing receipts based size standards for all industries in NAICS Subsector 484 (Truck Transportation), Subsector 487 (Scenic and Sightseeing Transportation), Subsector 492 (Couriers and Messengers), and Subsector 493 (Warehousing and Storage).

SBA has also retained current receipts based size standards for Offshore Marine Air Transportation Services (exceptions to NAICS Code 481211 and NAICS Code 481212), Offshore Marine Water Transportation Services (exception to NAICS Subsector 483, Water Transportation), Non-Vessel Owning Common Carriers and Household Goods Forwarders (exception to NAICS Code 488510), and Postal Services (NAICS Code 491110).

SBA did not review the 15 industries in NAICS Sector 48-49 that have employee based size standards. Therefore, SBA has retained the size standards for those industries at their current levels until the Agency reviews employee based size standards at a later date.

Compliance with Executive Orders 12866, 13563, 12988, and 13132, the Paperwork Reduction Act (44 U.S.C., Ch. 35) and the Regulatory Flexibility Act (5 U.S.C. 601-612)  
Executive Order 12866

The Office of Management and Budget (OMB) has determined that this final rule is a “significant” regulatory action for purposes of Executive Order 12866. Accordingly, the next section contains SBA’s Regulatory Impact Analysis. This is not a major rule, however, under the Congressional Review Act, 5 U.S.C. 800.

Regulatory Impact Analysis:

1. Is there a need for the regulatory action?

SBA believes that the revised changes to small business size standards for 22 industries in NAICS Sector 48-49, Transportation and Warehousing, reflect changes in economic characteristics of small businesses in those industries and the Federal procurement market. SBA’s mission is to aid and assist small businesses through a

variety of financial, procurement, business development, and advocacy programs. To assist the intended beneficiaries of these programs effectively, SBA establishes distinct definitions to determine which businesses are deemed small businesses. The Small Business Act (15 U.S.C. 632(a)) delegates to SBA's Administrator the responsibility for establishing definitions for small business. The Act also requires that small business definitions vary to reflect industry differences. The Jobs Act requires the Administrator to review one-third of all size standards within each 18-month period from the date of its enactment and to review all size standards at least every five years thereafter. The supplementary information section of the May 13, 2011 proposed rule and this rule explained in detail SBA's methodology for analyzing a size standard for a particular industry.

2. What are the potential benefits and costs of this regulatory action?

The most significant benefit to businesses obtaining small business status as a result of this rule is gaining eligibility for Federal small business assistance programs, including SBA's financial assistance programs, economic injury disaster loans, and Federal procurement opportunities intended for small businesses. Federal small business programs provide targeted opportunities for small businesses under SBA's various business development and contracting programs. These include the 8(a) Business Development program and programs benefiting small businesses located in Historically Underutilized Business Zones (HUBZone), women owned small businesses (WOSB), and service-disabled veteran-owned small businesses (SDVOSB). Other Federal agencies also may use SBA's size standards for a variety of regulatory and program purposes. These programs help small businesses become more knowledgeable, stable,

and competitive. In the 22 industries in NAICS Sector 48-49 for which SBA has decided to increase size standards, SBA estimates that about 1,200 additional firms will gain small business status and become eligible for these programs. That number is 0.7 percent of the total number of firms in industries in NAICS Sector 48-49 that have receipts based size standards. SBA estimates that this would increase the small business share of total industry receipts in those industries from 36 percent under the current size standards to 39 percent.

The benefits of increasing size standards to a more appropriate level will accrue to three groups in the following ways: (1) some businesses that are above the current size standards will gain small business status under the higher size standards, thereby enabling them to participate in Federal small business assistance programs; (2) growing small businesses that are close to exceeding the current size standards will be able to retain their small business status under the higher size standards, thereby enabling them to continue their participation in the programs; and (3) Federal agencies will have a larger pool of small businesses from which to draw for their small business procurement programs.

Based on the data for fiscal years 2007 to 2009, more than two-thirds of total Federal contracting dollars spent in industries reviewed in this proposed rule were accounted for by the 22 industries for which SBA is increasing size standards. SBA estimates that additional firms gaining small business status in those industries under the revised size standards could potentially obtain Federal contracts totaling up to \$25 million per year through the 8(a), HUBZone, WOSB, and SDVOSB programs and through other, unrestricted procurements. The added competition for many of these



procurements may also result in lower prices to the Government for procurements reserved for small businesses, although SBA cannot quantify this benefit.

Under SBA's 7(a) Business Loan and 504 Programs, based on the 2008 to 2010 data, SBA estimates that approximately 10 additional loans totaling \$4 million to \$5 million in new Federal loan guarantees could be made to the newly defined small businesses under the revised size standards. Under the Jobs Act, SBA can now guarantee substantially larger loans than in the past. In addition, the Jobs Act established an alternative size standard for SBA's 7(a) and 504 Loan Programs for those applicants that do not meet the size standards for their industries. That is, under the Jobs Act, if a firm applies for a 7(a) or 504 loan but does not meet the size standard for its industry, it might still qualify if, including its affiliates, it has a tangible net worth that does not exceed \$15 million and also has an average net income after Federal income taxes (excluding any carry-over losses) for its preceding two completed fiscal years that does not exceed \$5.0 million. Thus, increasing the size standards may result in an increase in small business guaranteed loans to small businesses in these industries, but it would be impractical to try to estimate the extent of their number and the total amount loaned.

Newly defined small businesses will also benefit from SBA's Economic Injury Disaster Loan Program. Since this program is contingent on the occurrence and severity of a disaster, SBA cannot make a meaningful estimate of benefits for future disasters.

To the extent that all 1,200 newly defined small firms under the revised size standards could become active in Federal procurement programs, this may entail some additional administrative costs to the Federal Government associated with additional bidders for Federal small business procurement opportunities, additional firms seeking

SBA guaranteed lending programs, additional firms eligible for enrollment in the Central Contractor Registration's Dynamic Small Business Search database and additional firms seeking certification as 8(a) or HUBZone firms or those qualifying for small business, WOSB, SDVOSB, and SDB status. Among businesses in this group seeking SBA assistance, there could be some additional costs associated with compliance and verification of small business status and protests of small business status. These added costs are likely to be minimal because mechanisms are already in place to handle these administrative requirements.

The costs to the Federal Government may be higher on some Federal contracts under the higher revised size standards. With a greater number of businesses defined as small, Federal agencies may choose to set aside more contracts for competition among small businesses rather than using full and open competition. The movement from unrestricted to set-aside contracting will likely result in competition among fewer total bidders, although there will be more small businesses eligible to submit offers. In addition, higher costs may result when additional full and open contracts are awarded to HUBZone businesses because of a price evaluation preference. The additional costs associated with fewer bidders, however, will likely be minor since, as a matter of law, procurements may be set aside for small businesses or reserved for the 8(a), HUBZone, WOSB, or SDVOSB Programs only if awards are expected to be made at fair and reasonable prices.

The revised size standards may have some distributional effects among large and small businesses. Although SBA cannot estimate with certainty the actual outcome of gains and losses among small and large businesses, there are several likely impacts.

There may be a transfer of some Federal contracts from large businesses to small businesses. Large businesses may have fewer Federal contract opportunities as Federal agencies decide to set aside more Federal contracts for small businesses. In addition, some agencies may award more Federal contracts to HUBZone concerns instead of large businesses since HUBZone concerns may be eligible for price evaluation adjustments when they compete on full and open bidding opportunities. Similarly, currently defined small businesses may obtain fewer Federal contracts due to the increased competition from more businesses defined as small under the revised size standards. This transfer may be offset by more Federal procurements set aside for all small businesses. The number of newly defined and expanding small businesses that are willing and able to sell to the Federal Government will limit the potential transfer of contracts away from large and small businesses under the existing size standards. The SBA cannot estimate with precision the potential distributional impacts of these transfers.

The revisions to the existing size standards for Transportation and Warehousing industries are consistent with SBA's statutory mandate to assist small business. This regulatory action promotes the Administration's objectives. One of SBA's goals in support of the Administration's objectives is to help individual small businesses succeed through fair and equitable access to capital and credit, Government contracts, and management and technical assistance. Reviewing and modifying size standards, when appropriate, ensures that intended beneficiaries have access to small business programs designed to assist them.

Executive Order 13563

A description of the need for this regulatory action and benefits and costs associated with this action including possible distributions impacts that relate to Executive Order 13563 is included above in the Regulatory Impact Analysis under Executive Order 12866.

In an effort to engage interested parties in this action, SBA has presented its methodology (discussed above under Supplementary Information) to various industry associations and trade groups. SBA also met with various industry groups to obtain their feedback on its methodology and other size standards issues. SBA also presented its size standards methodology to businesses in 13 cities in the U.S. and sought their input as part of the Jobs Act tours. The presentation also included information on the latest status of the comprehensive size standards review and on how interested parties can provide SBA with input and feedback on size standards review.

Additionally, SBA sent letters to the Directors of the Offices of Small and Disadvantaged Business Utilization (OSDBU) at several Federal agencies with considerable procurement responsibilities requesting their feedback on how the agencies use SBA size standards and whether current standards meet their programmatic needs (both procurement and non-procurement). SBA gave appropriate consideration to all input, suggestions, recommendations, and relevant information obtained from industry groups, individual businesses, and Federal agencies in preparing this proposed rule.

The review of size standards in NAICS Sector 48-49, Transportation and Warehousing, is consistent with EO 13563 § 6 calling for retrospective analyses of existing rules. The last overall review of size standards occurred during the late 1970s and early 1980s. Since then, except for periodic adjustments for monetary based size

standards, most reviews of size standards were limited to a few specific industries in response to requests from the public and Federal agencies. SBA recognizes that changes in industry structure and the Federal marketplace over time have rendered existing size standards for some industries no longer supportable by current data. Accordingly, in 2007, SBA began a comprehensive review of all size standards to ensure that existing size standards have supportable bases and to revise them when necessary. In addition, the Jobs Act directs SBA to conduct a detailed review of all size standards and to make appropriate adjustments to reflect market conditions. Specifically, the Jobs Act requires SBA to conduct a detailed review of at least one-third of all size standards during every 18-month period from the date of its enactment and do a complete review of all size standards not less frequently than once every 5 years thereafter.

#### Executive Order 12988

This action meets applicable standards set forth in Sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have retroactive or preemptive effect.

#### Executive Order 13132

For purposes of Executive Order 13132, SBA has determined that this rule will not have substantial, direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, SBA has determined that this rule has no federalism implications warranting preparation of a federalism assessment.

#### Paperwork Reduction Act

For the purpose of the Paperwork Reduction Act, 44 U.S.C. Ch. 35, SBA has determined that this rule would not impose any new reporting or record keeping requirements.

#### Final Regulatory Flexibility Analysis

Under the Regulatory Flexibility Act (RFA), this rule may have a significant impact on a substantial number of small entities in NAICS Sector 48-49, Transportation and Warehousing. As described above, this rule may affect small entities seeking Federal contracts, SBA's 7(a) and 504 Guaranteed Loans, SBA's Economic Injury Disaster Loans, and various small business benefits under other Federal programs.

Immediately below, SBA sets forth a final regulatory flexibility analysis of this final rule addressing the following questions: (1) What are the need for and objective of the rule? (2) What are SBA's description and estimate of the number of small entities to which the rule will apply? (3) What are the projected reporting, record keeping, and other compliance requirements of the rule? (4) What are the relevant Federal rules which may duplicate, overlap, or conflict with the rule? and (5) What alternatives will allow the Agency to accomplish its regulatory objectives while minimizing the impact on small entities?

#### (1) What are the need for and objective of the rule?

Most of SBA's size standards for the Transportation and Warehousing industries had not been reviewed since the 1980s. Technological changes, productivity growth, international competition, mergers and acquisitions and updated industry definitions may have changed the structure of many industries in that Sector. Such changes can be sufficient to support a revision to size standards for some industries. Based on the

analysis of the latest industry and program data available, SBA believes that the revised standards in this rule more appropriately reflect the size of businesses in those industries that need Federal assistance. Additionally, the Jobs Act requires SBA to review all size standards and make appropriate adjustments to reflect current data and market conditions.

(2) What are SBA's description and estimate of the number of small entities to which the rule will apply?

SBA estimates that approximately 1,200 additional firms will become small because of increases in size standards in 22 industries in NAICS Sector 48-49. That represents 0.7 percent of total firms in industries in that Sector that have receipts based size standards. This will result in an increase in the small business share of total industry receipts in those industries from about 36 percent under the current size standards to nearly 39 percent under the proposed standards. SBA does not anticipate a significant competitive impact on smaller businesses in these industries. The revised size standards will enable more small businesses to retain their small business status for a longer period. Under current size standards, many small businesses may have lost their eligibility or found it difficult to compete with companies that are significantly larger than they are, and this final rule attempts to correct that impact. SBA believes these changes will have a positive impact for existing small businesses and for those that have either exceeded or are about to exceed current size standards.

(3) What are the projected reporting, record keeping, and other compliance requirements of the rule and an estimate of the classes of small entities which will be subject to the requirements?

Revising size standards does not impose any additional reporting or record keeping requirements on small entities. However, qualifying for Federal procurement and a number of other Federal programs requires that entities register in the Central Contractor Registration (CCR) database and certify at least annually that they are small in the Online Representations and Certifications Application (ORCA). Therefore, businesses opting to participate in those programs must comply with CCR and ORCA requirements. There are no costs associated with either CCR registration or ORCA certification. Revising size standards alters the access to SBA programs that are designed to assist small businesses, but does not impose a regulatory burden as they neither regulate nor control business behavior.

(4) What are the relevant Federal rules which may duplicate, overlap, or conflict with the rule?

Under § 3(a)(2)(C) of the Small Business Act, 15 U.S.C. 632(a)(2)(c), Federal agencies must use SBA's size standards to define a small business, unless specifically authorized by statute. In 1995, SBA published in the Federal Register a list of statutory and regulatory size standards that identified the application of SBA's size standards as well as other size standards used by Federal agencies (60 FR 57988, November 24, 1995). SBA is not aware of any Federal rule that would duplicate or conflict with establishing or revising size standards.

However, the Small Business Act and SBA's regulations allow Federal agencies to develop different size standards if they believe that SBA's size standards are not appropriate for their programs, with the approval of SBA's Administrator (13 CFR 121.903). The Regulatory Flexibility Act authorizes an agency to establish an alternative



small business definition after consultation with the Office of Advocacy of the U.S. Small Business Administration (5 U.S.C. 601(3)).

(5) What alternatives will allow the Agency to accomplish its regulatory objectives while minimizing the impact on small entities?

By law, SBA is required to develop numerical size standards for establishing eligibility for Federal small business assistance programs. Other than varying size standards by industry and changing the size measures, no practical alternative exists to the existing system of numerical size standards. The possible alternative size standards considered for the individual NAICS Code industries within NAICS Sector 48-49 are discussed in the supplementary information to the proposed rule and this final rule.

#### List of Subjects in 13 CFR Part 121

Administrative practice and procedure, Government procurement, Government property, Grant programs – business, Individuals with disabilities, Loan programs—business, Reporting and recordkeeping requirements, Small businesses.

For reasons set forth in the preamble, SBA amends 13 CFR part 121 as follows:

#### **PART 121 – SMALL BUSINESS SIZE REGULATIONS**

1. The authority citation for part 121 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 636(b), 662, 694a(9).

2. In § 121.201, in the table, revise the entries for “481219”, “485111”, “485112”, “485113”, “485119”, “485210”, “485310”, “485320”, “485410”, “485510”, “485991”, “485999”, “486210”, “488111”, “488119”, “488190”, “488210”, “488310”, “488320”, “488330”, “488390”, and “488510” to read as follows:

§ 121.201 What size standards has SBA identified by North American Industry

Classification System codes?

\* \* \* \* \*

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
* * * * *			
<b>Sector 48-49 – Transportation and Warehousing</b>			
* * * * *			
481219	Other Nonscheduled Air Transportation	\$14.0	
* * * * *			
485111	Mixed Mode Transit Systems	\$14.0	
485112	Commuter Rail Systems	\$14.0	
485113	Bus and Other Motor Vehicle Transit Systems	\$14.0	
485119	Other Urban Transit Systems	\$14.0	
485210	Interurban and Rural Bus Transportation	\$14.0	
485310	Taxi Service	\$14.0	
485320	Limousine Service	\$14.0	
485410	School and Employee Bus Transportation	\$14.0	
485510	Charter Bus Industry	\$14.0	
485991	Special Needs Transportation	\$14.0	
485999	All Other Transit and Ground Passenger Transportation	\$14.0	
* * * * *			
486210	Pipeline Transportation of Natural Gas	\$25.5	
* * * * *			
488111	Air Traffic Control	\$30.0	
488119	Other Airport Operations	\$30.0	
488190	Other Support Activities for Air Transportation	\$30.0	

488210	Support Activities for Rail Transportation	\$14.0	
488310	Port and Harbor Operations	\$35.5	
488320	Marine Cargo Handling	\$35.5	
488330	Navigational Services to Shipping	\$35.5	
488390	Other Support Activities for Water Transportation	\$35.5	
* * * * *			
488510	Freight Transportation Arrangement <sup>10</sup>	<sup>10</sup> \$14.0	
* * * * *			

#### Footnotes

\* \* \* \* \*

10. *NAICS codes 488510 (part) 531210, 541810, 561510, 561520, and 561920* —As measured by total revenues, but excluding funds received in trust for an unaffiliated third party, such as bookings or sales subject to commissions. The commissions received are included as revenues.

\* \* \* \* \*

Dated: December 21, 2011

Karen G. Mills,  
Administrator.

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